

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

—vs.—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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August 26, 1988

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No. 87-2048

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The briefs *amici*¹ and Petition demonstrated that the decision of the Court of Appeals creates serious, detrimental implications for the economy and the law.

Respondents, in their Brief in Opposition and their Response to *Amici*, make scant effort to defend the rule of law adopted below. Rather, their thrust is that the Ninth Circuit's basis for decision can be disregarded because plaintiffs might have pur-

¹ Motions for leave to file briefs as *amici curiae* in support of the Petition have been filed by the National Association of Manufacturers, the American Petroleum Institute, the Society of Independent Gasoline Marketers of America, the National Association of Convenience Stores, the Petroleum Marketers Association of America and the National Association of Texaco Wholesalers.

sued a different tack. Plaintiffs might have chosen to focus their claim on the period after Dompier, the wholesaler, acquired its first retailer and on competition between plaintiffs and stations operated by Dompier (as opposed to stations operated by independent retailers who purchased from Dompier in its capacity as pure wholesaler).

But plaintiffs did not so confine their claims; they did the opposite. They took the position there was no legal difference between competition with independent retailers purchasing from Dompier and with Dompier's own salary-operated stations (e.g., B-6 n.6). They took the position there was no legal difference between the period Dompier was nothing but a wholesaler and the period it was more. They declined to differentiate between these periods and declined to permit the jury to do so, stipulating that if they are wrong and there is a legal difference, they will suffer the consequences.²

Accordingly, the Court of Appeals had no alternative but to confront the question it addressed of the legality of selling to wholesalers at lower prices than retailers. And, needless to say, it is this Court's practice to "decide the case as it was framed by the Court of Appeals." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. ___, ___ n.2, 108 S.Ct. 1931, 1936 n. 2 (1988).³

² The Petition noted:

"Thirty months into the damage period, Dompier, in addition to being a wholesaler, acquired its first retail service station and then over the years acquired a few others (B-4 n.4), continuing to act as a pure wholesaler to twelve independent retailers (ER 34-35). Plaintiffs did not distinguish between these two periods, conceding that if it was lawful for Texaco to sell to Dompier at the price charged all wholesalers during the thirty month period in which Dompier was nothing but a wholesaler, judgment must be for Texaco. (ER 529-30)." Petition at 4 n.3.

This is not disputed by the Brief in Opposition.

³ As is clear from the opinion of the Court of Appeals, Texaco preserved the issues raised by the Petition and that court was abundantly aware of Texaco's position on those issues.

It is of exceptional national importance that the writ issue and the rules announced by the Court of Appeals, which even respondents are reluctant to defend, be corrected.

Dated: August 26, 1988

Respectfully submitted,

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